

1 UNIVERSAL CITY STUDIOS, INC.

2 v.

3 NINTENDO OF AMERICA CO., LTD.

82 Civ. 4259 RWS

May 22, 1985

9:50 a.m.

6 (In open court)

7 JOHN V. DiMURO resumed.

8 CROSS-EXAMINATION

9 BY MR. KIRBY: (Continued)

10 Q. Good morning, Mr. DiMuro.

11 A. Good morning, Mr. Kirby.

12 Q. You understand, of course, that you are still
13 under oath?

14 A. I certainly do.

15 Q. Mr. DiMuro, have you taken the Universal City
16 Studios tour recently?

17 A. Not recently.

18 Q. Do you know whether at the Universal City
19 Studios tour this is now a King Kong attraction?

20 A. I do not.

21 Q. Have you ever visited the Universal City Florida
22 tour site?

23 A. I have not.

24 Q. Do you know whether there is an Universal City
25 King Kong attraction at that tour site?

1 Let me put in front of you Defendant's Exhibit
2 93 in evidence. I take it that is the agreement about
3 which you were testifying; is that correct, Mr. DiMuro?

4 A. This is the one, that is correct.

5 Q. Which paragraph of that agreement is the
6 paragraph that gave you the right to make a movie involving
7 King Kong substantially similar to the RKO copyrighted 1933
8 movie?

9 MR. FAIRHURST: Objection.

10 THE COURT: Overruled.

11 A. Paragraph 6.

12 Q. And are you referring to the first sentence of
13 paragraph 6?

14 A. Actually, I am reading the first sentence and
15 the second sentence and interpreting both sentences as a
16 unit.

17 Q. Do the words substantially similar appear
18 anywhere in paragraph 6?

19 A. They do not.

20 Q. Mr. DiMuro, paragraph 6 refers to RKO's covenant
21 not to sue Universal with respect to its making a King Kong
22 motion picture, doesn't it?

23 A. Yes, it does.

24 Q. It doesn't refer to anything other than motion
25 pictures in paragraph 6, does it?

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1 A. That is correct.

2 MR. KIRBY: Your Honor, by the way, this exhibit
3 also appears as Plaintiff's Exhibit 2 as well as being in
4 Defendant's Exhibit 93 which is the Universal/RKO volume
5 where it's tab 20. I apologize for failing to make that
6 identification.

7 THE COURT: That's all right.

8 Q. Now, Mr. DiMuro, it's a fact, is it not, despite
9 your interpretation of paragraph 6 with respect to
10 Universal's motion picture rights that that is not the
11 advice that you gave Mr. Sheinberg with respect to an
12 Universal movie on April 8, 1982?

13 MR. FAIRHURST: Objection. I don't think the
14 question can be answered the way its been put.

15 THE COURT: Overruled.

16 A. The April 8, 1982 memo was directed to a
17 specific provision in this settlement agreement and
18 represented my opinion as to how that provision should be
19 dealt with.

20 Q. And it is not the advice, Mr. DiMuro, is it,
21 that you gave a couple of months later in July of 1982 with
22 respect to Universal City Tours, is it?

23 A. It is not the same advice; different subject
24 matter.

25 Q. By the way, Mr. DiMuro, I believe this is clear

1 from what you have said, but there's no reference in
2 paragraph 6 to Universal's merchandising rights, is there?

3 A. There is not.

4 Q. Mr. DiMuro, overnight did you have occasion to
5 find out anything more about the Jaws merchandising program?

6 A. I did not.

7 Q. Do you know that Jaws was the fifth largest
8 grossing motion picture of all time?

9 A. I'm aware that it was a very successful
10 Universal picture.

11 Q. And you are aware that it had a very successful
12 merchandising program?

13 A. That is correct.

14 Q. Are you aware that Jaws was produced and
15 released for distribution in 1975?

16 A. I was aware it was released before 1980, yes.

17 Q. My specific question is: Were you aware that it
18 was produced and released in 1975?

19 A. I did not recall the exact date.

20 Q. Do you recall it now that I have refreshed your
21 recollection? I am representing to you that it was.

22 A. I believe that's correct.

23 Q. Is it your testimony now, with your memory
24 refreshed, that you changed your mind about Mr. Kroft's
25 representations and arguments to the federal district court

1 A. The Cooper interlocutory judgment was handed
2 down at about the same time as the Universal declaratory
3 relief judgment. That was in 1976, the latter part of 1976.

4 So the Cooper judgment -- bear in mind, please,
5 there were two judgements involving Mr. Cooper. There was
6 an interlocutory judgment and then sometime later the court
7 wanted to retain jurisdiction to make sure that RKO
8 accounted properly to Major Cooper. There was a final
9 judgment.

10 Q. You know when that final judgment was entered,
11 don't you, Mr. DiMuro?

12 A. Sometime after the interlocutory.

13 Q. It's true, isn't it, as you have just testified,
14 that the only reason the Cooper judgment was designated
15 interlocutory was so that the court with the assistance of
16 a master could determine the damages that should flow to
17 Mr. Cooper?

18 A. That's correct.

19 (Continued on next page)

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1 Q. And the judge didn't change his findings of
2 facts and conclusions of law in connection with that, did
3 he?

4 A. That is correct.

5 Q. He just supplemented them with the damage funds?

6 A. That is correct.

7 Q. And at the time Universal entered into the
8 agreement with Major Cooper, the Cooper judgment,
9 interlocutory, and the Universal judgment were in effect,
10 were they not?

11 A. Yes.

12 Q. And when you drafted or participated in drafting
13 the Cooper agreement, Mr. DiMuro, you knew those judgments
14 were in force, didn't you?

15 A. I certainly did, yes.

16 Q. Mr. DiMuro, when you drafted the Cooper
17 Universal agreement with those judgments in force, you knew
18 what the findings of fact and conclusions of law were
19 supporting those judgments, didn't you?

20 A. That is correct, of course.

21 Q. That is why, isn't it, Mr. DiMuro, when you
22 drafted the Cooper agreement, participated in drafting the
23 Cooper agreement, you didn't include in there as part of
24 what Mr. Cooper was selling to Universal the word trademark,
25 did you?

1 A. We included a very generic provision, that
2 Universal acquired all right, title and interest that Major
3 Cooper had acquired under the Cooper judgment, and that
4 judgment was extremely broad because that judgment covered
5 all of the right, title and interest in the name, character
6 and story King Kong, all merchandising rights with respect
7 to the merchandising of the name and character King Kong,
8 and the Cooper Universal agreement took -- Universal
9 acquired under that agreement all of Cooper's rights under
10 that Cooper judgment and any subsequent judgment.

11 Q. My question to you, Mr. DiMuro, was not that.
12 My question to you was whether or not -- indeed, that
13 wasn't. Let me be more precise. My question was, you
14 didn't include the word trademark in that agreement, did
15 you, the word trademark?

16 A. The agreement speaks for itself. The specific
17 word trademark is not in the agreement, yes, of course.

18 Q. And when you say yes, of course, it was because
19 among other reasons that based on Universal's arguments and
20 presentation of evidence Judge Real had found that King
21 Kong wasn't a trademark.

22 A. Incorrect, not so.

23 Q. Is it a fact, Mr. DiMuro, that Judge Real found
24 that King Kong was not a trademark?

25 A. I disagree. Judge Real found that RKO was a

1 constructive trustee for Major Cooper with respect to all
2 merchandising activities of RKO and that would include the
3 good will generated by RKO over many, many years and would
4 include any trademarks which might have developed from the
5 exercise of those merchandising rights over many, many
6 years. I think that is the only reasonable implication and
7 interpretation of the Cooper judgment, the interlocutory
8 judgment, and that is what we were dealing with when we
9 drafted the Universal Cooper agreement.

10 Q. You testified yesterday in response to my
11 questions, Mr. DiMuro, that you were aware, and I take it
12 you are still aware today, that the court adopted among its
13 findings of facts and conclusions of law:

14 "15. There is no evidence that the title King
15 Kong has a secondary meaning by which the public identifies
16 such title with RKO or the motion picture."

17 And you were aware yesterday that the court had
18 included this language in paragraph 6: "The name King Kong
19 has become part of the ordinary English language."

20 You are aware of that today too, aren't you?

21 A. Yes.

22 Q. And you were aware yesterday and you were aware
23 of it when you drafted the Cooper agreement, weren't you?

24 A. Yes, sure.

25 Q. Thank you.

1 When you drafted the Cooper agreement, Mr.
2 DiMuro, you specifically included in paragraph 9 of that
3 agreement an acknowledgement that Universal's judgment and
4 findings of facts were in effect, didn't you?

5 THE COURT: If you want to lead him a little
6 further, look at paragraph 11. Sorry, I couldn't resist.

7 Q. Would you care to look at paragraph 11, Mr.
8 DiMuro?

9 THE COURT: I am sure Mr. DiMuro has committed
10 it to memory. I apologize. I just had to prove that
11 despite being late I was awake.

12 Q. Mr. DiMuro, have you ever drafted a trademark
13 agreement involving the sale of a trademark?

14 A. I had no occasion to.

15 MR. FAIRHURST: I have to object to the form.

16 THE COURT: Overruled.

17 Q. Have you ever drafted an agreement involving the
18 transfer of a trademark from one owner to another?

19 A. An assignment of a trademark.

20 Q. Assignment of a trademark, a transfer, a
21 conveyance from one person to another person. Have you
22 ever drafted one?

23 A. I was involved in the assignment of the Mego
24 trademark. That went from Mego to RKO and then from RKO to
25 Universal. And I do believe that I was involved in the

1 transfer of the trademark RKO to Universal.

2 Q. Did you draft that assignment?

3 A. I don't recall specifically at this point but I
4 had some involvement with it.

5 Q. Did you review it if you didn't draft it?

6 A. Yes. I know I reviewed it and I believe I
7 drafted it. I am not certain at this point.

8 Q. Any other trademark transfers that you can
9 recall today that you were involved in?

10 A. No, I don't recall any other assignment
11 involving a trademark.

12 MR. KIRBY: Your Honor, I would like to have
13 marked as Defendant's Exhibit 104 for identification a
14 letter from Joseph Victor DiMuro to Mr. William Regan,
15 dated December 17, 1982. It is two pages, the second of
16 which is an assignment.

17 (Defendant's Exhibit 104 was marked for
18 identification)

19 THE COURT: What is 93 through 103?

20 MR. KIRBY: Defendant's 93, your Honor, is the
21 large RKO volume.

22 THE COURT: I know. Why don't I have those?

23 MR. KIRBY: Your Honor, you should have them.
24 Some of them are the games.

25 THE COURT: Right. Wait a minute. Maybe I can

1 work my way through this.

2 MR. KIRBY: Your Honor, let me give you the list.

3 THE COURT: No, I think I have got it. I
4 apologize. I am under control. I got it.

5 MR. KIRBY: It is all in the designation list
6 and most of them are physical.

7 THE COURT: Right, sorry.

8 MR. KIRBY: Your Honor, I am putting in front of
9 Mr. DiMuro Defendant's Exhibit 104 for identification,
10 which is Exhibit 80 to his deposition. Your Honor, here is
11 a copy. We will supply one labeled shortly. With your
12 Honor's permission, since we are running short of copies,
13 if I may stand by Mr. DiMuro as we go through this.

14 THE COURT: Sure.

15 Q. Mr. DiMuro, would you please look at Defendant's
16 Exhibit 104 for identification and tell me whether that is
17 a letter that you wrote to Mr. Regan and if that is the
18 assignment of the Mego transfer as to which you have just
19 testified?

20 A. This is the letter I sent to Mr. Regan and this
21 is the assignment that was enclosed with the letter.

22 Q. I take it from the fact that you sent that to
23 Mr. Regan that your memory may now be refreshed that you
24 drafted that assignment.

25 A. I believe I did.

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1 Q. Mr. DiMuro, would you please read the second
2 "whereas" clause of that agreement out loud.

3 A. "Whereas Mego corporation has heretofore signed
4 on to RKO General Inc., a New York corporation, of 1440
5 Broadway, New York, New York, all rights, title and
6 interest in and to said trademark and said registration,
7 together with the good will of the business symbolized by
8 said trademark."

9 Q. Thank you, Mr. DiMuro. The actual operative
10 paragraph, the assignment, would you please read that.

11 A. "Now therefore, for good and valuable
12 consideration, receipt of which is hereby acknowledged,
13 said RKO General Inc. does hereby assign on to said
14 Universal City Studios Inc. all rights, title and interest
15 in and to said trademark and said registration, together
16 with the good will of the business symbolized by said
17 trademark."

18 Q. Thank you, Mr. DiMuro.

19 Mr. DiMuro, I take it from your testimony, and
20 indeed from my examination as well as yours of the Cooper
21 agreement, that no such language appears in the Cooper
22 agreement, is that correct?

23 A. That is correct.

24 Q. When you were drafting this assignment, Mr.
25 DiMuro, did you consult any form books with respect to

1 transfer of trademarks?

2 A. I did not.

3 Q. You drafted this out of your own knowledge?

4 A. That assignment follows practically verbatim the
5 assignment from Mego to RKO. So all I did was adopt the
6 same language in drafting the assignment from RKO to
7 Universal.

8 Q. Did you do any research when you followed that
9 other assignment form to determine whether or not this form
10 was an adequate and proper method for transfer of a
11 trademark?

12 A. I don't recall doing any research.

13 Q. But it was your opinion that this was an
14 adequate method of Universal securing the trademark for
15 Mego?

16 A. Yes, it was.

17 Q. And it is true, isn't it, Mr. DiMuro, that this
18 assignment is dated the 3rd of January 1983, isn't it?

19 A. That is correct.

20 Q. And that is 18 months after Nintendo was sued by
21 Universal, isn't it?

22 A. Let's figure it out, Mr. Kirby. The complaint
23 was filed in June of 1982.

24 MR. FAIRHURST: Six months, your Honor.

25 MR. KIRBY: I apologize. I didn't do a very

1 good job of my mathematics, did I?

2 Q. That was six months after this lawsuit was filed
3 against Nintendo, wasn't it?

4 A. I answered the question, Mr. Kirby. The
5 complaint was filed in June of 1982. It would be
6 approximately six months, yes.

7 Q. You made the arrangements for securing this
8 transfer of registration -- by the way, this was a
9 registered trademark, wasn't it?

10 A. Yes.

11 Q. And you made the arrangements with RKO's Mr.
12 Regan for the transfer of this registration, didn't you?

13 A. That is correct.

14 Q. When did you first find out that Mego had a
15 registered trademark for a King Kong toy?

16 A. In the course of discovery in this litigation.

17 Q. So sometime after June 29, 1982?

18 A. That is correct.

19 Q. And prior to that time did you have any
20 knowledge of what trademark registrations there were for
21 King Kong?

22 A. I don't believe so.

23 Q. How was it that in particular you came to find
24 out about this trademark in the course of discovery?

25 A. At some point in the course of discovery I saw

1 trademark reports which had been requested by, I believe,
2 Mrs. Sifuentes.

3 Q. Trademark reports on what?

4 A. On King Kong.

5 Q. Do you know when those were requested?

6 A. My recollection is that one was requested in the
7 latter part of 1981, and I think there was a second
8 trademark report in the early part of 1982.

9 Q. And you weren't aware at the time they were
10 requested that they were requested?

11 A. I was not.

12 Q. And you weren't informed of the results of that
13 request?

14 A. I was not.

15 Q. Did Mr. Hadl request that you get this transfer
16 of a registration from Mego to Universal?

17 A. He did not.

18 Q. Did Mr. Fairhurst?

19 A. He did not.

20 Q. But you informed both of them that you had done
21 it, didn't you?

22 A. I may have.

23 Q. Let me show you Defendant's Exhibit 104. It
24 shows c.c.'s to Mr. Fairhurst and Mr. Hadl, doesn't it?

25 A. Then I informed them.

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1 Q. Mr. DiMuro, let me turn your attention to -- let
2 me withdraw that question and ask you this, Mr. DiMuro:
3 Did you thereafter take steps to acquire any other
4 registrations you became aware of in the course of this
5 litigation for King Kong?

6 A. You mean any registration of what?

7 Q. Any registrations for King Kong that you became
8 aware of in the course of this litigation.

9 A. The question isn't clear, Mr. Kirby. Do you
10 mean a trademark registration?

11 Q. That is right, a trademark registration.

12 A. No, I did not.

13 Q. Did you, at the time you discovered this Mega
14 registration, review Nintendo's interrogatory asking about
15 any registrations for King Kong?

16 A. I don't recall specifically if I reviewed those
17 interrogatories at that time, no. I did at some point.

18 Q. Mr. DiMuro, turning your attention to your
19 memorandum of June 18, 1980 about which you testified
20 yesterday, that is the memorandum referred to on this chart
21 under June 1980. You testified yesterday that you prepared
22 that memorandum in response to a request from Mr. Sheinberg,
23 is that correct?

24 A. That is correct.

25 Q. I believe you testified that Mr. Sheinberg told

1 you that he wanted you to advise him as to what
2 merchandising rights Universal had in the King Kong story,
3 is that correct?

4 A. That is correct.

5 Q. And it is true, isn't it, that Mr. Sheinberg did
6 not ask you what trademark rights Universal had in Kong
7 Kong, isn't it?

8 A. That is correct.

9 Q. And you knew or had testified that Mr. Sheinberg
10 wasn't interested in the trademark when you requested that
11 he inform you as to merchandising rights, isn't that
12 correct?

13 A. That is correct.

14 (Continued on next page)

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1 BY MR. KIRBY:

2 Q. So it wasn't the purpose of this memorandum to
3 advise Mr. Sheinberg or any other recipient that Universal
4 had a trademark in King Kong; is that correct.

5 MR. FAIRHURST: Objection.

6 THE COURT: Overruled.

7 A. That was not the purpose of the memorandum.

8 Q. Looking at Plaintiff's Exhibit 3, Mr. DiMuro,
9 you simply advised Mr. Sheinberg of what's in that
10 memorandum and nothing more, didn't you?

11 A. At that time, that is correct.

12 Q. Did you review Universal's 3 G statement filed
13 in this action? Do you know what a 3 G statement is?

14 A. I am not sure I know what you are talking about.

15 Q. Let me show you what is designated Plaintiff's
16 Civil Rule 3 G Statement, Mr. DiMuro. This is a statement
17 required under the rules of this court to be filed in
18 connection with a summary judgment motion and it is
19 supposed to set forth the material facts as to which there
20 are no genuine issues to be tried.

21 Let me ask you to take a look at that, Mr.
22 DiMuro, and tell me if you reviewed it or participated in
23 any way in the drafting of that 3 G statement.

24 (Pause)

25 A I don't recall seeing this statement.

1 Q. Do you recall seeing it after it was filed with
2 this court?

3 A. I do not.

4 Q. Do you recall discussing its contents prior to
5 the time it was filed in this court?

6 A. I do not.

7 Q. So, Mr. DiMuro, let me ask you specifically:
8 Did you know that this 3 G statement says: "In June 1980
9 Joseph DiMuro, an attorney at Universal, set forth in a
10 memorandum for Sidney Sheinberg, Universal's president, the
11 legal basis upon which Universal could claim trademark
12 rights in King Kong."

13 Did you know that?

14 A. No.

15 Q. Now, based on your testimony as to what your
16 memorandum contained, that statement isn't true, is it?

17 MR. FAIRHURST: Objection.

18 THE COURT: Sustained.

19 Q. Now, Mr. DiMuro, in your deposition you
20 testified as to what you meant by merchandising right?

21 A. Yes.

22 Q. Can you tell the court what you mean by
23 merchandising right?

24 A. A merchandising right, as understood in the
25 motion picture industry, is the right to use or to license

1 the use of a character from a movie in connection with any
2 products such a toys, games, puzzles, posters and to sell
3 and exploit such products.

4 As I believe I testified yesterday -- and I may
5 not have mentioned this in the deposition -- the character
6 can be either and an animate character like King Kong or ET
7 or it can be a living actor portraying a particular role.

8 Q. Mr. DiMuro, it's true, isn't it, that in your
9 view a trademark is incident to the exercise of
10 merchandising rights but you start out with the
11 merchandising rights and a trademark can flow from it; is
12 that correct?

13 A. That's correct.

14 MR. FAIRHURST: Objection.

15 THE COURT: Overruled.

16 Q. That's not what Mr. Sheinberg asked you about,
17 is it, a trademark right or whether a trademark flowed from
18 merchandising rights?

19 A. No. Mr. Sheinberg asked me if the merchandising
20 arm of Universal could merchandise King Kong and that had a
21 specific connotation and meaning in the industry and I
22 replied to his specific inquiry.

23 Q. Now, it's true, isn't it, Mr. DiMuro, as you
24 have just testified and explained the term, that the term
25 merchandising rights is not coterminous with trademark

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1 rights?

2 MR. FAIRHURST: Objection.

3 THE COURT: Overruled.

4 A. Well, in my opinion --

5 Q. Can you answer that question yes or no?

6 MR. FAIRHURST: I don't think that's fair, your
7 Honor.

8 THE COURT: Well, given his expertise, I'll take
9 it.

10 Q. You go ahead and answer the question, Mr. DiMuro.

11 A. In my opinion, you have to have the right to
12 merchandise a particular product and once you have
13 merchandised the product and the product is successfully
14 sold and exploited certain goodwill is generated in the
15 minds of the public and trademark rights will evolve from
16 that exploitation, from that advertising and sale of the
17 specific product. This is my view. This has been my view
18 all along.

19 Q. Okay. Thanks, Mr. DiMuro.

20 Basically, if I understand your testimony you're
21 saying it's possible for a trademark to evolve from the
22 exercise of merchandising rights; is that correct?

23 A. Well, you have to sell the product before you
24 develop goodwill.

25 Q. So merchandising rights first, then maybe a

1 trademark will develop out of that exercise; is that
2 correct?

3 A. I think so; that's my opinion.

4 Q. So it is fair to say in response to my direct
5 question that the terms, as you use them, merchandising
6 rights and trademark rights, are not coterminous?

7 A. That's my belief and that's my opinion.

8 Q. Thank you. Now, just so that we continue to
9 have our date sequence in mind, Mr. DiMuro, when you wrote
10 that memorandum on June 18, 1980, the Cooper judgment, the
11 Universal judgment, the findings of fact and the
12 conclusions of law were still extant, were they not?

13 A. Yes, they were.

14 Q. And do you know when they were vacated?

15 A. They were vacated in around October 1980 by the
16 U.S. Court of Appeals for the Ninth Circuit. It issued an
17 order vacating you will all of the judgements in the case,
18 in the declaratory relief action.

19 Q. Now, you have in front of you your memorandum,
20 Plaintiff's Exhibit 3 of June 18, 1980; is that correct?

21 A. Yes, I do.

22 Q. Now, you reviewed a number of documents in that
23 memorandum?

24 A. I'm sorry.

25 Q. you reviewed a number of documents in the course

1 of writing that memorandum, didn't you?

2 A. Yes.

3 Q. And you formed your conclusion expressed in your
4 last two paragraphs based on those documents, didn't you?

5 A. Yes.

6 Q. What you were advising Mr. Sheinberg, based on
7 those documents, Mr. DiMuro, as I understand it, is that
8 RKO didn't have any more merchandising rights in King Kong,
9 DDL didn't have any more merchandising rights in King Kong,
10 that Cooper didn't have any more merchandising rights in
11 King Kong because of these various agreements and that
12 Universal had superior rights to each of those entities to
13 exercise King Kong merchandising rights; isn't that what
14 you were advising Mr. Sheinberg?

15 A. Mr. Kirby, you left out the most important
16 element. You left out the Cooper judgment.

17 Q. I'm sorry, and the Cooper judgment. I didn't
18 mean to exclude any of your document.

19 A. That's the nut of the whole thing. All of
20 Universal's rights stem from the Cooper judgment and any
21 ancillary judgment and Major Cooper assigned those rights
22 under the Cooper/Universal agreement.

23 Q. So what you were advising Mr. Sheinberg and what
24 you advised DDL and RKO and so forth is that Universal was
25 going to start merchandising King Kong and they couldn't do

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1 it any more and your rights were superior to theirs; is
2 that correct?

3 A. Yes, that is correct.

4 Q. Did you know at the time you wrote this
5 memorandum of anyone else claiming a right to merchandise
6 King Kong other than the parties you have recited in this
7 agreement?

8 A. I am not aware of any other claimant, no.

9 Q. So you were advising Mr. Sheinberg that
10 Universal's rights were superior to any other claimant that
11 you knew?

12 A. Universal's merchandising rights, that is
13 correct.

14 Q. Were superior to any other claimant that you
15 knew?

16 A. Yes, sir.

17 Q. Did you know, Mr. DiMuro, as part of your
18 participation in production of documents and answering
19 interrogatories in this action, that this memorandum was
20 not produced in discovery until a decision was made to
21 waive the attorney-client privilege in October of 1984; did
22 you know that?

23 A. You say this memorandum, which one?

24 Q. PX 3, in front of you, your memorandum.

25 A. Yes. A decision was made at some point -- I

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1 Q. Thank you, Mr. DiMuro.

2 I am asking you -- let me put it this way so it
3 is a positive statement: that your advice on the subject
4 of how Universal is to represent an ape in connection with
5 anything it does with respect to King Kong has been the
6 same since June 1980 to the present day, and that advice is
7 reflected in Defendant's Exhibit 79 in July of '82. Is
8 that correct or isn't it?

9 A. I think we are overlooking a memorandum that I
10 sent to Mr. Sheinberg that you questioned me about
11 yesterday.

12 Q. Is the advice in that memorandum different -- I
13 take it you are talking about the April 8, 1982 memorandum.

14 A. Yes.

15 Q. Is the advice there different about how the ape
16 is to be represented than it is in July of '82?

17 A. The objectives of the two memos are different.

18 Q. I understand that, Mr. DiMuro. You have
19 explained that at some length to the court and to me.

20 A. Yes.

21 Q. But is the advice the same and has it been the
22 same since June of 1980?

23 A. I have difficulty answering your question
24 because the objective to be achieved in the two memos is
25 different and therefore the language is not necessarily the

1 same. That is the best way I can answer your question. In
2 the April 8 memo, if I recall the correct memo, we were
3 dealing with the question as to whether or not Universal
4 had to approach or clear with De Laurentis before Universal
5 made its King Kong picture. That is entirely different
6 from the objective in the July 1982 memorandum to the tour
7 division. So the advice is given in keeping with the
8 objectives of the two memos. That is all I can say.

9 Q. And it is entirely different from the objective
10 in Universal bringing this lawsuit too, isn't it?

11 MR. FAIRHURST: Objection.

12 A. I don't understand your question.

13 Q. Do you recall having your deposition taken a
14 month ago, Mr. DiMuro?

15 A. Of course, Mr. Kirby.

16 Q. I am reading beginning at page 87 from that
17 deposition, Mr. DiMuro. Listen to these questions and
18 answers and tell me when I have finished reading this
19 whether this is the testimony that you gave. You had in
20 front of you at that time this memorandum, Defendant's
21 Exhibit 79:

22 "Q. Can you read the handwriting? Let me read
23 it and see if you agree to this:

24 "Peter, I asked Claire to add language that
25 made the ape not look like the King Kong in either movie,

t4

mh t4

1 otherwise okay' and there is a signature which I cannot
2 decipher. Is that what the document says?

3 "A. I believe so, yes, yes.

4 "Q. Did you advise or instruct anyone at
5 Universal MCA that the ape would not look like the King
6 Kong in either movie?

7 "MR. FAIRHURST: The ape in the attraction,
8 is that what you are talking about?

9 "MR. KIRBY: Yes.

10 "THE WITNESS: I said that in the Tony
11 Sauber memo.

12 "Q. In this handwritten note, do you know who
13 wrote that?

14 "A. On looking at it, Mr. Kirby, I see -- it
15 appears to me that might be Tony Sauber's copy because I
16 see a line. I am just surmising that it might be. I see a
17 line through his name.

18 "Q. Yes.

19 "A. I am not familiar with Mr. Sauber's
20 handwriting so I will not speculate as to who made this
21 notation on the memorandum.

22 "Q. But this notation, I take it from your
23 testimony, is consistent with your advice?

24 "A. Yes, yes.

25 "Q. To make sure that I understand this, did

1 your advice with respect to that topic ever change from
2 June 1980 until the present day?

3 "A. No. My opinion hasn't changed. I want to
4 make it clear that the intent of this statement in the
5 Sauber memorandum of July 27, 1982 to Mr. J. Stein is that
6 Universal should not copy the precise gorilla that appears
7 in the 1933 RKO motion picture or the 1976 De Laurentis
8 picture.

9 "Q. I am going to show you what has been
10 marked for identification at trial as Defendant's Exhibit
11 81, which is a September 23, 1982 memorandum from Alexander
12 to Wesley, and I refer you to the second page of that
13 exhibit under paragraph scope of work, the last paragraph.
14 You then read.

15 "A. The paragraph beginning

16 "Q. 'It is understood.'

17 "A. Yes.

18 'The King Kong figure shall be an original
19 design based on a living figure. In no event shall the
20 figure be based on the King Kong figure used in any
21 previously released motion picture.'

22 "Q. Did you suggest that language --

23 "A. I did not.

24 "Q. -- be incorporated in the contract?

25 "A. I did not.

A 2486

1 "Q. I take it that this is an example of the
2 King Kong contract that you did not review.

3 "A. That is correct.

4 "Q. Did you ever discuss with anyone at
5 Universal or MCA that the Universal depiction of King Kong
6 should be based on a living ape figure?

7 "MR. FAIRHURST: I think, Mr. Kirby, that
8 question was asked and answered at least twice in reference
9 to the memorandum that has been marked as Defendant's
10 Exhibit 79 referred to on the chart, the Sauber memo. That
11 is what it says and I think the witness testified that that
12 indeed was consistent with his advice.

13 "BY MR. KIRBY:

14 "Q. Do you adopt your counsel's statement?

15 "MR. FAIRHURST: He is not adopting, he is
16 testifying.

17 "MR. KIRBY: All right, well.

18 "MR. FAIRHURST: He testified to that
19 before, Mr. Kirby.

20 "MR. KIRBY: I am now asking if he adopts
21 your statement.

22 "MR. FAIRHURST: Fair enough.

23 "THE WITNESS: Yes, yes."

24 Do you recall those questions and answers
25 interspersed with amusing interjections by your counsel and

1 me taking place during your deposition?

2 A. Yes, I do.

3 Q. You don't want to change your answer that you
4 gave in that deposition, do you, Mr. DiMuro?

5 A. No, I don't.

6 Q. Let me put in front of you a copy of Defendant's
7 Exhibit 79 in evidence, Mr. DiMuro. Please look at the
8 third paragraph of that letter, that memorandum from Mr.
9 Sauber to Mr. Stein. Refresh my recollection, Mr. DiMuro.
10 Did you see this memorandum at or about the time it was
11 written?

12 A. I haven't finished reading it yet, Mr. Kirby.

13 Q. I apologize.

14 A. What is your question?

15 Q. My question, Mr. DiMuro, was whether you had
16 seen this memorandum at or about the time it was written.

17 A. No, no, sir.

18 Q. You do recall having discussions with Mr. Sauber
19 on this subject, don't you?

20 A. Yes, I do.

21 Q. Would you please read the third paragraph of
22 Defendant's Exhibit 79.

23 A. "Joe felt that we would have these rights from
24 our ownership of the book King Kong. If that book is in
25 the public domain as we had previously successfully

1 asserted, then the rights themselves would be in the public
2 domain."

3 Q. Is Mr. Sauber accurately reporting to Mr. Stein
4 what you told him in that paragraph?

5 A. I believe so.

6 Q. Mr. DiMuro, prior to your deposition being taken
7 in this action you read both volumes of Miss Sifuentes'
8 deposition, did you not?

9 A. I did.

10 Q. You didn't read the first volume of her
11 deposition after she gave that, immediately after it was
12 transcribed, though, did you?

13 A. That is correct.

14 Q. You read the second volume immediately after it
15 was transcribed, is that correct?

16 A. That is correct.

17 Q. When did you read the first volume?

18 A. I read the first volume immediately before the
19 deposition.

20 Q. That is in April of this year?

21 A. The deposition, as you well know, was on April
22 18 of this year and my testimony is that I read the first
23 volume immediately prior to April 18, 1985.

24 Q. Mr. DiMuro, you testified yesterday that after
25 this memorandum was disseminated within Universal that you

1 details and I didn't do it. It was a short conversation, I
2 have testified to what the conversation consisted of and
3 all of these other things were not discussed.

4 Q. I read your memo. Miss Sifuentes said, "Does it
5 mean we can merchandise?" and you said, "Yes," the end.

6 A. That is basically what was discussed.

7 Q. Was there any reason you didn't tell Miss
8 Sifuentes anything about the movies?

9 A. There was a very good reason, Mr. Kirby.

10 Q. What is that?

11 A. The reason is that Universal owns the totality
12 of the merchandising rights and that means they can do
13 anything they want in merchandising short of using an
14 actual copyrighted still of the RKO 1933 movie, be it the
15 still of the gorilla on the Empire State Building or any
16 other copyrighted still from that movie.

17 Apart from that one qualification, which is an
18 employee right matter, Universal has the totality of the
19 merchandising rights and that means it has complete rights
20 to deal with merchandising as it sees fit.

21 Q. When Miss Sifuentes called you up to ask you
22 about your memorandum, you didn't think it was important to
23 tell her of course you can't use stills.

24 A. It was not necessary, in my opinion.

25 Q. In any event, you didn't tell her?

1 in response to this memorandum of July 16, 1980?

2 A. I don't recall any conversation.

3 Q. Do you recall doing anything to assist her?

4 A. I do not.

5 Q. Do you recall making any contacts with RKO or
6 anyone else about getting film clips or anything else from
7 them during this period prior to September 1981?

8 A. I do not.

9 Q. But you do recall receiving this memorandum?

10 A. I do.

11 Q. I'm asking, Mr. DiMuro, to do your best to tell
12 us whether there was any reason that you can think of today
13 as to why you would not have responded to Miss Sifuentes'
14 memo?

15 A. No reason that I can think of except if you want
16 me to -- I'm not supposed to speculate. I can tell you as
17 a matter of industry practice getting a copyrighted still
18 of a motion picture is much easier than having the company
19 which owns a particular picture agree to cut out a clip and
20 have that clip used in merchandising or actually used for a
21 television ad. I must tell you that Universal City Studios
22 has a policy against licensing any film clips from its
23 films because it feels that it is helping -- might be
24 helping other producers and we just don't do it.

25 Q. Okay.

1 Q. Mr. DiMuro, when you next spoke to Miss
2 Sifuentes, was it after the Tiger license agreement had
3 been entered into by Universal or before?

4 A. After.

5 Q. Did Miss Sifuentes have any discussion with you
6 with respect to that license prior to its execution?

7 A. She did not.

8 Q. Did she ask you to review the license after its
9 execution?

10 A. Sometime in early 1982 Mrs. Sifuentes mentioned
11 to me that Tiger Electronic Toys had failed to deliver
12 prototypes, art work and advertising formats for the
13 articles which they were licensed to merchandise under the
14 Tiger Electronics license agreement. She wanted to know if
15 this would be grounds for the termination of that agreement.
16 I reminded Mrs. Sifuentes that in the boilerplate language
17 of the license agreement there is a provision requiring the
18 licensee to furnish the prototypes and the art work and the
19 advertising formats prior to any manufacture or
20 distribution of the licensed articles.

21 I expressed to Mrs. Sifuentes that in my opinion
22 the failure to furnish these items was a breach by Tiger
23 and that indeed Merchandising Corporation of America had
24 the right to terminate the contract.

25 Q. That conversation was in May of '82, wasn't it,

1 Mr. DiMuro?

2 A. Early '82, yes.

3 Q. And prior to that time had Miss Sifuentes
4 informed you of the license agreement with Tiger?

5 A. I believe so.

6 Q. When do you believe she informed you?

7 A. Sometime in the latter part of 1981 she asked my
8 assistance in obtaining copyrighted stills from RKO to be
9 used by the Tiger people.

10 Q. At that time did she tell you about the Tiger
11 agreement, I take it?

12 A. Yes.

13 Q. Did you ask her for a copy of the Tiger
14 agreement?

15 A. No.

16 Q. Did you ask her why she hadn't consulted with
17 you before entering into an agreement with respect to King
18 Kong?

19 A. She was not obligated to consult with me. There
20 was no studio policy or studio requirement to that effect.

21 Q. My question was, did you raise that subject with
22 her? Did you say, Miss Sifuentes, why didn't you consult
23 with me?

24 A. No, because --

25 Q. I have heard your answer.

1 Q. What about during January through March of 1982?

2 A. The first agreement that comes to mind is the
3 agreement with Coleco which I drafted in May of 1982. Do
4 you want me to go down the list?

5 Q. In May of 1982, Coleco?

6 A. That is my best recollection at the moment.

7 Q. During the period October '81 through May of
8 1982 when you testified you drafted the Coleco agreement,
9 were you aware of the activity of Merchandising Corporation
10 of America with respect to King Kong?

11 A. In that period I was assisting Mrs. -- in
12 October of 1981 I was assisting Mrs. Sifuentes to obtain
13 copyrighted stills from RKO and in that connection I
14 contacted Betty Levine of the New York office of RKO for
15 her assistance in obtaining stills for Mrs. Sifuentes, and
16 Miss Levine then contacted Mrs. Sifuentes and delivered
17 some stills which I understand eventually went to Tiger.

18 Q. Did Universal obtain a license to use those
19 stills from RKO?

20 A. There was a letter of understanding between
21 Betty Levine on behalf of RKO and Mrs. Sifuentes, which I
22 have seen, which indicated that the stills were being given
23 a license for merchandising purposes and that RKO consented
24 to that particular use of these copyrighted RKO stills.

25 Q. Any specific merchandising purpose or general

1 merchandising purpose?

2 A. My recollection is that the letter was in
3 general terms and did not deal with a specific
4 merchandising project.

5 Q. Did you, Mr. DiMuro, play any part in the
6 drafting of that letter?

7 A. I did not.

8 Q. When did you see that letter last?

9 A. I have seen it certainly within the last few
10 weeks.

11 Q. Where did you see it?

12 A. One of the files that I have.

13 Q. In your offices in Los Angeles?

14 A. Right.

15 Q. Did you produce that letter to Townley & Updike
16 in connection with discovery in this case?

17 A. I don't recall.

18 Q. So you don't recall whether you did anything
19 about it, withheld it, gave it to them? You just don't
20 know whether that letter went to Townley & Updike?

21 A. Mr. Kirby, there was a mountain of documents and
22 I can't tell you off the top of my head if it went to
23 Townley & Updike. If it was part of the material that was
24 asked for it would have gone in the normal course of events.

25 Q. Do you know whether that letter was produced to

1 Nintendo America in this lawsuit?

2 A. I would have to check. I don't recall offhand,
3 no.

4 Q. But you don't recall any reason why it would be
5 withheld, do you?

6 A. Of course not.

7 MR. KIRBY: I will represent to the court that
8 document was never produced.

9 Q. Mr. DiMuro, did you see that letter of
10 understanding at or about the time it was entered into?

11 A. I don't honestly recall.

12 Q. Did you have any discussion with Miss Sifuentes
13 about that letter?

14 A. At the time that it was written I know that Mrs.
15 Sifuentes got the copyrighted stills and that this letter
16 was part of it.

17 Q. I asked you a specific question.

18 A. I am trying to understand your question.

19 Q. Did you have any discussion with Miss Sifuentes
20 about that letter, discussion, talk?

21 A. No. I remember telling her that Betty Levine
22 was the person at RKO with whom she should talk. I recall
23 talking to Betty Levine and asking her if she would license
24 or permit us to use the RKO copyrighted stills, that Mrs.
25 Sifuentes would like to have a license on these stills,

1 like to have them for use in connection with merchandising
2 by Universal.

3 Following that I have seen this letter from
4 Betty Levine to Mrs. Sifuentes agreeing that this could be
5 done.

6 Q. You had this one discussion with Miss Sifuentes
7 when she called and asked you about this and you told her
8 Betty Levine is the person to talk to, right?

9 A. I believe so, yes.

10 Q. And do you know about when that was?

11 A. Sometime in October of 1981 is as close as I can
12 come to it.

13 Q. Did you have any followup discussions with her
14 on that subject or any other subject involving King Kong
15 between October of 1981 up until May of '82 when you
16 testified you had a conversation with her with respect to
17 terminating Tiger?

18 A. I did not.

19 Q. None?

20 A. From October '81 to May of '82, no, I had no
21 conversation.

22 Q. No conversations with her.

23 Did you have during that period any
24 conversations with Mr. Steven Adler, her superior at
25 Merchandising Corporation of America, with respect to King

1 likely that I would be consulted by those people who had
2 knowledge of my involvement going back to 1975 it is also
3 likely that I might not be.

4 Q. Miss Sifuentes knew about your involvement with
5 King Kong dating back to 1975, didn't she?

6 A. She was an older employee, yes.

7 Q. Mr. Adler knew, didn't he?

8 A. That is correct.

9 Q. Mr. Sheinberg certainly knew, didn't he?

10 A. Yes.

11 Q. Mr. Hadl knew, didn't he?

12 A. Since he joined the company, yes.

13 Q. When did he join the company?

14 A. I don't remember.

15 Q. Mr. DiMuro, you testified that you had a
16 telephone conversation with Miss Sifuentes prior to her
17 second deposition. Do you recall today whether you called
18 her or she called you?

19 A. I don't recall who initiated the conversation,
20 but there was a conversation, that's correct.

21 Q. And in that conversation Miss Sifuentes told you
22 that she thought she ought to be represented by counsel and
23 wanted to know whether Universal would represent her at
24 that second deposition, didn't she?

25 A. She did.

A2496

1 Q. And did you tell her that Universal would?

2 A. I did not.

3 Q. Did Miss Sifuentes tell you why she thought she
4 ought to be represented by counsel supplied by Universal at
5 that second deposition?

6 A. She did not.

7 Q. Did she tell you that she had had to invoke the
8 attorney-client privilege repeatedly on behalf of Universal
9 at her first deposition?

10 A. She did.

11 Q. Did she tell you that that was the reason why
12 she thought she ought to have counsel at the second
13 deposition?

14 A. I believe so.

15 Q. Did you agree with her that she ought to have
16 counsel?

17 A. I said I would discuss it with Mr. Fairhurst.

18 Q. Did you urge her to have counsel?

19 A. No. I said I would discuss it with Mr.
20 Fairhurst. I took no position on it.

21 Q. Did you tell Miss Sifuentes in the course of
22 that conversation that she should be loyal to Universal?

23 A. I did not.

24 Q. You're lawyer to Universal, aren't you, Mr.
25 DiMuro?

1 to send a telex, give us some assistance?

2 A. I know that Mr. Sheinberg did not call me.

3 Q. Do you recall Mr. Hadl calling you and saying
4 something to that effect?

5 A. Mr. Hadl did not call me on that subject.

6 Q. When was the first contact you had with Mr. Hadl
7 in May of 1982 with respect to King Kong?

8 A. Well, Mr. Hadl asked me to draft an agreement
9 with Coleco industries.

10 Q. Okay. That was your first contact with Mr. Hadl
11 on the subject of King Kong in May of 1982?

12 A. Yes, sir.

13 Q. Had you ever had any discussions prior to that
14 with Mr. Hadl about King Kong?

15 A. I don't recall any.

16 Q. Did Mr. Hadl ever ask you to brief him on
17 Universal's rights in King Kong?

18 A. He did not.

19 Q. Did Mr. Hadl ever discuss with you any memoranda
20 you had written on the subject of King Kong?

21 A. He did not.

22 Q. Specifically, did he ever ask you about your
23 June 18, 1980 memorandum?

24 A. He did not.

25 Q. Did he ever tell you that he had recently seen

1 that memorandum in May of 1982?

2 A. No.

3 Q. Did he ever tell you when you were discussing
4 with him the Coleco agreement that he had seen any
5 memorandum that you had written on the subject of King Kong?

6 A. He did not.

7 Q. Did he ever ask you to look at the Donkey Kong
8 video arcade game?

9 A. No, sir.

10 Q. Did he ever ask you whether Universal had a
11 trademark in King Kong?

12 A. He did not.

13 Q. Did he ever ask you whether Universal had a
14 registered trademark in King Kong?

15 A. No, sir.

16 Q. When he called you with respect to the Coleco
17 agreement, can you tell me when that was?

18 A. Sometime in May, early May of 1982.

19 Q. When you were a consultant?

20 A. Yes, I have been a consultant.

21 Q. Since 1977?

22 A. Since April 1977.

23 Q. Did Mr. Hadl tell you that he was asking you to
24 do the contract after consulting with Mr. Mittleman?

25 A. No, sir. We don't operate that way.

1 Q. Did he tell you why he called you?

2 A. No, sir.

3 Q. Were you surprised to be called by Mr. Hadl to
4 draft the Coleco agreement?

5 A. Not in the least. I testified that I am
6 contacted on an ongoing basis by the top executives in the
7 company. So this came as no surprise and was a perfectly
8 normal practice within the company.

9 Q. The Coleco agreement is dated May 12, 1982. I
10 take it that Mr. Hadl must have called you before May 12?

11 A. Yes.

12 Q. Do you remember whether it was the 1st of May?

13 A. I can't pin the date down. It would have been
14 prior to May 12th, of course.

15 Q. What did Mr. Hadl say to you when he gave you
16 this assignment?

17 A. Mr. Hadl told me that Universal had entered into
18 an agreement with Coleco pursuant to which Universal would
19 covenant not to sue Coleco by reason of Coleco's
20 manufacture and distribution of the Donkey Kong game and in
21 return for this covenant not to sue Coleco had agreed to
22 pay to Universal a royalty of 3 percent of the wholesale
23 sale price of the Donkey Kong game. That was essentially
24 what he told me and he said would you please prepare a
25 covenant not to sue expressing this understanding.

1 Q. Did he tell you what the Donkey Kong game was
2 about?

3 A. Not in any detail. We did discuss the game. He
4 described it in some degree, but it was a limited
5 discussion.

6 Q. Did he ask you to take a look at the game?

7 A. No, he did not.

8 Q. Did you ask him any questions about the game?

9 A. No more than I needed for the drafting of the
10 document.

11 Q. Did you ask him who manufactured the game?

12 A. I asked him or he told me that Nintendo was the
13 manufacturer. I don't recall how that information
14 developed.

15 Q. But you obtained that information in the course--

16 A. Through him, yes.

17 Q. Did you ask him what Universal was going to do
18 with respect to Nintendo?

19 A. I did not.

20 Q. Did he tell you?

21 A. He did not.

22 Q. He didn't discuss Nintendo in any way other than
23 learning that Nintendo was the manufacturer of the game
24 that Coleco was going to produce for a home game?

25 A. Basically, he told me what he wanted in the

1 agreement and he didn't go into any other detail.

2 Q. He told you, didn't he, that it was Universal's
3 position that Donkey Kong was an infringement of Universal's
4 trademark in King Kong?

5 A. He told me, yes, it was our position that the
6 Donkey Kong game infringed upon Universal's rights, yes.

7 Q. Trademark rights in King Kong?

8 A. All right.

9 Q. Is that what he said?

10 A. I don't recall the verbatim language at this
11 point but he said something to that effect, that's correct.

12 Q. I'm asking you to the best of your recollection
13 did he say trademark rights in King Kong?

14 A. The best of my recollection is that he told me
15 that Nintendo was violating, infringing Universal's King
16 Kong rights.

17 Q. And that's the way he put it?

18 A. To the best of my recollection.

19 Q. I understand. That's all you can do, Mr. DiMuro,
20 is testify to the best of your recollection.

21 Now, did you ask him what rights? That question
22 can be answered yes or no. Did you ask him what rights?

23 A. No.

24 Q. Did you ask him if you could be of any
25 assistance in counseling on that matter?

A2502

1 A. I did not.

2 Q. I take it he didn't ask you to get involved?

3 A. He did not.

4 Q. Did he tell you that he was having discussions
5 with Nintendo?

6 A. No, sir.

7 Q. Did he tell you that Nintendo or Coleco had
8 asked for some evidence that Universal had rights in King
9 Kong?

10 A. He did not.

11 Q. Did he ask you to prepare any memorandum setting
12 out the source of and extent of Universal's King Kong
13 rights?

14 A. He did not.

15 (Continued on next page)

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1 Q. So you went off and drafted the agreement?

2 A. I drafted the agreement, given the information
3 that he furnished, and submitted it to him.

4 Q. You testified that Miss Sifuentes asked you
5 about terminating the Tiger license, and you advised her --
6 you have testified to this several times at some length,
7 about your advice to her on the boilerplate contents of the
8 agreement which gave them the right to terminate because
9 they hadn't submitted the art work.

10 After that conversation with Miss Sifuentes,
11 when was the next time you heard about Tiger?

12 A. I believe the next time I heard about Tiger was
13 when I received a copy of a wire from Mrs. Sifuentes to
14 Tiger Electronics terminating the Tiger license.

15 Q. Do you recall when that wire was dated?

16 A. The wire, I believe, was dated May 7, 1982 and I
17 received it on May 19, 1982.

18 Q. Did that wire set out a reason for Tiger's
19 termination?

20 A. I believe the reason given was the failure to
21 furnish prototypes and art work.

22 Q. Did you read it when you received it?

23 A. I read it on May 19, 1982, yes.

24 Q. Is that wire as to which you are now testifying
25 Plaintiff's Exhibit 17 in evidence now before you?

3
1 A. Yes, this is the wire that I received on May 19,
2 1982.

3 Q. And you see in that wire, Mr. DiMuro, that at
4 the time the wire was sent Universal had in fact received
5 art work, advertising, promotion, catalog material from
6 Tiger, hadn't it?

7 A. That is what the wire says.

8 Q. And you see that the wire says that that
9 material was used without Universal's prior approval,
10 doesn't it?

11 A. Yes.

12 Q. The wire also says that:

13 "The advertising packaging and catalog material
14 which you have prepared and distributed without our prior
15 approval makes clear that the display board and concept of
16 your King Kong mini-arcade table top electronic game is
17 substantially similar to the display board and concept of a
18 popular arcade game called Donkey Kong currently owned and
19 marketed by another company. Under the circumstances, we
20 would not have approved the display board and concept of
21 your King Kong mini-arcade table top electronic game had
22 they been submitted for prior approval and we certainly
23 disapprove them at this time."

24 Do you see that in this telex?

25 A. That is what it says.

A2505

1 Q. And this telex terminated Tiger as a Universal
2 licensee, did it not?

3 A. I am not prepared to testify as to the legal
4 effect of this telex but it certainly appears to be the
5 intent of the sender, that the contract was terminated.

6 Q. To your knowledge did Miss Sifuentes have any
7 legal advice in preparing this termination telex?

8 A. All I know, Mr. Kirby, is that she consulted
9 with me on that one occasion, but I don't know who drafted
10 the document. She signed it. I was not involved in the
11 drafting.

12 Q. Was May 19 the first time after the conversation
13 you have described and testified to with Miss Sifuentes,
14 the boilerplate conversation, that you had heard anything
15 about Tiger?

16 A. I don't recall anything else about Tiger in that
17 period.

18 Q. Do you know why you received this telex on May
19 19?

20 A. I don't know any specific reason other than the
21 fact that Mrs. Sifuentes may have felt that since she
22 consulted with me originally that this might be of interest
23 to me.

24 Q. Did she tell you that Mr. Hadl had told her to
25 send a telex?

A2506

1 A. She did not, and I was not aware of the
2 transmittal of this telex until I received a copy on May 19,

3 Q. After you received it did you do anything?

4 A. I did not.

5 Q. You had no conversation with Miss Sifuentes?

6 A. No conversation with Mrs. Sifuentes.

7 Q. Any conversation with Mr. Hadl?

8 A. No conversation with Mr. Hadl on this subject
9 matter.

10 Q. I take it from your testimony, Mr. DiMuro, that
11 you are testifying that you never heard of Donkey Kong
12 until Mr. Hadl called you to his office and asked you to
13 draft a Coleco agreement.

14 A. I don't recall being aware of it before that.

15 Q. You don't recall anyone else at Universal
16 discussing that with you?

17 A. I am sure no one else at Universal told me about
18 Donkey Kong.

19 Q. After June of 1980 and the settlement agreement
20 with RKO, Mr. DiMuro, had Universal had the occasion to
21 file any lawsuits to vindicate any right in King Kong prior
22 to the lawsuit filed against Nintendo of America on June 29,
23 1982?

24 A. I don't recall any lawsuits in that period.

25 Q. Had it had the occasion to terminate any King

1 resolution of the dispute. I don't waste an executive's
2 time by asking unnecessary questions. I do what I am
3 supposed to do and if I have a question that I think is
4 relevant then I ask it. Otherwise, I don't bother the
5 executive. He doesn't want to be bothered.

6 Q. I take it you are telling us that you did know
7 that the dispute had been resolved because of the draft he
8 handed to you?

9 A. I received the draft. I don't say he literally
10 handed it to me. It probably came in the mail. I looked
11 at it and I either had a phone conversation with him or he
12 may have -- I believe it was probably a phone conversation,
13 that he asked me to look at the draft and get back to him,
14 revise it if I thought it was necessary, which I did.

15 Q. Did you ask him, Mr. DiMuro, what changes Tiger
16 had made in order to render their game not substantially
17 similar Nintendo's game?

18 A. No, sir.

19 Q. Did you suggest that you might review the game?

20 A. No, sir.

21 Q. Did you give him any conservative advice about
22 making sure that Universal wasn't permitting a licensee to
23 infringe on Nintendo's copyrighted product?

24 A. He did not request my advice and I didn't give
25 it. He simply requested that I review an existing

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1 amendment and if necessary in my judgment make any
2 revisions that I thought were indicated, and I am talking
3 now of form and not substance. The substance of the
4 arrangement was set out in this draft memorandum and my
5 task was simply to review that and see if it clearly
6 expressed the points of the draft, the terms of the draft.

7 Q. Mr. DiMuro, stepping back in time just a little
8 bit, Mr. Hadl had asked you to draft the Coleco agreement
9 which was signed as of May 12, 1982.

10 A. Right, that is correct.

11 Q. Was it your understanding of that agreement that
12 Universal was being licensed to produce Donkey Kong
13 products by Universal?

14 A. You mentioned Universal twice. I am not sure
15 what you mean. Universal as being licensed --

16 Q. I am sorry, that Coleco was being licensed by
17 Universal to produce Donkey Kong products.

18 A. No, sir. This was purely a covenant not to sue.

19 Q. Did you review the interrogatory responses filed
20 in this action, Mr. DiMuro?

21 A. Which ones?

22 Q. Let me ask you specifically about the
23 interrogatory responses filed on October 25, 1982, the same
24 year, and the response to interrogatory number 7, which
25 asked in the preface: "Identify all licensees of the name,

1 litigation from the inception is rather complex.

2 THE COURT: Even today.

3 Q. Mr. DiMuro, you also testified in your
4 deposition, page 15, that from 1977 to the present,
5 "Whenever a matter involving the King Kong rights came up I
6 was consulted, whether it came from Mr. Sheinberg or any
7 other executive in the company who might be interested in
8 the rights."

9 You stand behind that statement you made in your
10 deposition, don't you?

11 A. I think that is an honest statement of the
12 situation. There may be exceptions but basically the
13 executives know that I have been involved in this matter
14 for many years and they will consult me.

15 Q. It is fair to say, isn't it, Mr. DiMuro, that
16 just looking at the people like yourself who have offices
17 at Universal, that you are more knowledgeable about
18 Universal's claimed rights in King Kong than anyone else,
19 with the possible exception of Mr. Sheinberg. I will not
20 ask you to testify to superior knowledge to the president.

21 MR. FAIRHURST: I am going to object to the form
22 unless Mr. Kirby wants to be clear who everybody else is.
23 It has an inherent ambiguity.

24 Q. I thought I made that clear, anyone who has
25 their office there or works for Universal or the MCA family

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1 of companies as an employee.

2 A. I think it would be presumptuous of me to take a
3 position there. I have spent time on this litigation as
4 part of my duties at Universal. I have knowledge of the
5 litigation, and I will not presume to say that I am the one
6 at Universal who knows more about it than anyone else. I
7 just can't answer that question.

8 Q. Is there anyone else that you can think of who
9 might be more knowledgeable?

10 A. Certainly Mr. Kroft.

11 Q. I am asking at Universal, Mr. DiMuro. You know
12 what I am asking you.

13 A. Mr. Kirby, I am trying to answer your question.
14 Now please don't be impatient with me. I am trying very
15 hard to answer your questions.

16 Q. Focus on Universal.

17 A. I thought that within the Universal family you
18 would include Mr. Kroft.

19 Q. I don't.

20 A. You exclude him, fine. Let's go on from there.

21 Q. I exclude Mr. Kroft from the Universal family.
22 He is not a day-to-day employee --

23 A. Mr. Kroft is very closely involved with
24 Universal. He is one of the partners who is involved in
25 litigation on an ongoing basis. He spends a lot of time at

1 Universal. Let's exclude him. Is there anyone else?

2 Q. By the way, is your statement still true today
3 about Mr. Kroft, that he is intimately involved with the
4 affairs of Universal, he spends a lot of time there --

5 A. Litigation.

6 Q. Is that true today?

7 A. He is involved in litigation for the studio,
8 that is correct.

9 Q. May 1985.

10 A. He has litigation involving Universal City
11 Studios, yes.

12 Q. Right now?

13 A. I believe so.

14 Q. Mr. DiMuro, excluding Mr. Kroft, anyone else who
15 works for Universal that you know of who has more knowledge
16 than you about Universal's claimed rights in King Kong?

17 A. I don't know of anyone else.

18 Q. Mr. DiMuro, we know and you have testified that
19 Mr. Sheinberg turned to you to get advice about Universal's
20 merchandising rights in King Kong. That is correct, isn't
21 it?

22 A. That is correct.

23 Q. And even though there is dispute about the
24 nature of the conversation we know that you acknowledge
25 that Mr. Miss Sifuentes after receiving that memorandum

10

1 called you to ask whether Universal had the rights to
2 merchandise King Kong, isn't that correct?

3 A. That is correct.

4 Q. And we know that though there is dispute about
5 when this went on, that Miss Sifuentes turned to you to get
6 help in obtaining stills from RKO about King Kong. That is
7 correct, isn't it?

8 A. That is correct.

9 Q. And we know based on your assertions after lunch
10 that you were involved in October of '81 in consulting
11 about the King Kong license, proposed King Kong license to
12 Continental Airlines, weren't you?

13 A. Yes. I sent a memorandum to Mr. Adler.

14 Q. Look, Mr. DiMuro, I am just asking were you
15 involved, yes or no.

16 A. Involved to the extent of bucking the matter to
17 Mr. Adler, period, and that was the end of my involvement.
18 I want to be sure that you understand that.

19 Q. And you also had an inquiry involving Mr.
20 Goldberger sometime early in 1982 and that came to your
21 attention.

22 A. Right.

23 Q. And we know because you testified to it that
24 Miss Sifuentes talked to you about the grounds or at least
25 one grounds for canceling the Tiger license, the only

1 Universal-generated King Kong license in May of 1982.

2 A. Yes, yes.

3 Q. And we know that Mr. Hadl asked you to draft the
4 Coleco agreement.

5 A. That is correct.

6 Q. And we know that he asked you to review and
7 revise a proposed termination of the Tiger agreement.

8 A. Not a termination.

9 Q. Excuse me, I misspoke. Thank you. A proposed
10 amendment to the Tiger agreement.

11 A. That is correct.

12 Q. And we know that you were advised, albeit ten
13 days later, that Universal had canceled the Tiger agreement,
14 right?

15 A. Yes, that May 19 I received a copy of the wire,
16 yes.

17 Q. And we know, don't we, that on April 8 of 1982
18 that you were the one advising Mr. Sheinberg about how
19 Universal should use an ape and design an ape in connection
20 with a proposed movie, is that?

21 A. No, that is not correct. That memo was
22 addressed to how Universal should deal with the question of
23 whether or not to contact and clear with Dino De Laurentis
24 Universal's proposed production of a motion picture
25 involving King Kong.

1 Q. We know that you wrote that memorandum on April
2 8 and you formulated some guidelines which you attached
3 with that memorandum on April 8.

4 A. Correct.

5 Q. And we know that in July you were the one
6 advising on how the ape should look in the tour attraction,
7 right?

8 A. That is correct.

9 Q. And we know that in September you at least
10 endorsed the advice with respect to the tour attraction
11 that "the King Kong figure shall be an original design
12 based on a living ape figure."

13 A. Just hold up a minute. Where are you reading,
14 sir?

15 Q. I am sorry. I am reading from September of 1982

16 A. I am not sure if that is my memorandum, but that --
17 I am wondering if that is the one that Blair Westlake --

18 Q. That is the same advice, isn't it, that you
19 rendered in July? You didn't change your mind, did you,
20 when you wrote the memorandum in September?

21 A. I am trying to determine if I changed my mind,
22 Mr. Kirby. You are getting ahead of me. "In no event
23 shall the figure be based on the King Kong figure used in
24 any previously released motion picture."

25 That appears to be consistent with my advice,

1 yes.

2 Q. And we know, don't we, Mr. DiMuro, that one day
3 you happened to be reviewing the King Kong file and you
4 concluded that Universal should get an assignment of the
5 Mego trademark, and you drafted that assignment of that
6 registration, didn't you?

7 A. Yes.

8 Q. That was December of '82.

9 And we know that sometime in the spring of '83
10 you were involved in drafting a license agreement for
11 Robert Keith for a balloon, weren't you?

12 A. For an inflatable replica of King Kong, that is
13 correct.

14 Q. And you testified yesterday that you were
15 involved in working out a license for another inflatable
16 balloon project utilizing King Kong.

17 A. I advised one of my associates, Mr. Crichen,
18 about the drafting of that document, yes.

19 Q. And throughout this litigation you have been the
20 person at Universal responsible for gathering documents and
21 other material, looking at interrogatories and generally
22 serving as liaison with your outside counsel, isn't that
23 correct?

24 A. That is correct.

25 Q. But your testimony, Mr. DiMuro, is that nobody

1 at Universal asked your advice or consulted you in any way
2 with respect to the telex sent to Nintendo on April 28.

3 A. That is absolutely correct.

4 Q. And no one asked you to help prepare a chain of
5 titles setting out Universal's rights in King Kong to
6 supply to Nintendo.

7 A. That is correct.

8 Q. And nobody asked you to assist in drafting the
9 complaint that was filed against Nintendo.

10 A. That is correct.

11 Q. And you didn't review the telex before it was
12 sent, is that correct?

13 A. The telex to Nintendo?

14 Q. Yes.

15 A. I was not aware of it.

16 Q. Not even aware of it?

17 A. That is correct.

18 Q. And you didn't review the complaint before it
19 was filed?

20 A. I did not.

21 Q. You weren't even aware of when it was filed,
22 were you?

23 A. That is correct.

24 Q. When did you become aware of it?

25 A. Subsequent to June of '82.

1 Q. And you didn't have any discussions with Mr.
2 Kroft on this subject, did you, prior to the time the
3 complaint was filed?

4 A. I did not.

5 Q. And you don't know anything about whether or not
6 Universal conducted an independent investigation of its
7 rights with respect to King Kong prior to sending the telex,
8 do you?

9 A. The telex of Nintendo?

10 Q. Yes?

11 A. I am not aware of any independent investigation.

12 (Continued on next page)

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1 BY MR. KIRBY:

2 Q. And you are not aware of any investigation
3 conducted between the time the telex was sent in April of
4 1982 and the time the complaint was filed on June 29, 1982,
5 are you?

6 A. That is correct.

7 Q. And Mr. Sheinberg never talked to you about this
8 subject?

9 A. That is correct.

10 Q. And when you were asked to draft the Tiger
11 agreement -- amendment. Excuse me. Let me be precise.

12 When you were asked to review a draft of the
13 Tiger amendment and prepare the Coleco agreement nobody
14 ever mentioned what the plans were with respect to to or
15 Nintendo what was going on with Nintendo at that time?

16 A. That is a correct statement.

17 Q. And you never asked anyone what was going on?

18 A. That's right.

19 Q. And you never said to anyone in April of 1982,
20 gee, consider my guidelines or consider the memorandum I
21 wrote to Mr. Sheinberg in connection with this Nintendo
22 matter, did you?

23 A. I wasn't aware of the problem with Nintendo and
24 I think you're mixing apples with oranges because Nintendo
25 has to do with the Donkey Kong game. This has to do with

1 motion pictures.

2 Q. By the way, Mr. DiMuro, I take it that you've
3 been involved in at least some of the merchandising
4 activities of Universal with respect to King Kong since
5 December of 1983?

6 A. Since December of 1983, I don't recall
7 specifically what that involvement would be, but tell me.

8 Q. I'm asking you, today, do you recall from
9 December 1983 and to today being involved in any Universal
10 licensing of King Kong?

11 A. Merchandise licensing?

12 Q. Merchandise licensing.

13 A. Well, we have carved out the Robert Keith &
14 Company. We have carved out the Phillips organization.
15 Are we excluding the cease and desist letter to Sluggo's?

16 Q. I don't know. When was it sent?

17 A. Sometime in 1983. I didn't send it. Mr. Kricun
18 sent it. So those three items. Beyond that I don't
19 presently recall what other involvement I may have had with
20 merchandising.

21 Q. Let me ask you this question this way: Do you
22 know whether since December 1983 Universal has issued a
23 merchandising license with respect to King Kong, December
24 1983 until today?

25 A. Well, I don't know of my own knowledge. But

1 Q. You have used it?

2 A. Yes.

3 Q. Can you tell me what you mean by the term
4 merchandising?

5 A. I can tell you what I mean. I don't know if it
6 is generally acceptable. I think in my deposition I tried.
7 I can try again. Merchandising rights involve the
8 exploitation, commercial exploitation of any or all
9 elements of a motion picture other than through theatrical
10 or other exhibition, which they are called exhibition
11 rights, and also other than musical rights, which I may
12 have omitted in my deposition. It is toys, games, puzzles.
13 And excluding publishing rights too.

14 Q. So it would include what you were describing
15 before of RKO licensing before, the activity of RKO
16 licensing, merchandisers, I think you said, to use elements
17 of the King Kong movie on articles.

18 A. That is right.

19 Q. Mr. Reagan, do you know if RKO had any standard
20 form agreements that they gave to merchandisers when they
21 did license elements from the King Kong movie?

22 A. I don't think there was any standard form but as
23 you know, you do one, sometimes you refer to the prior one,
24 modify it, but I don't think there was any standard form,
25 form B 2 or something. It was just a model we would follow,

I suppose, yes.

Q. I am sorry. I thought you said something about exhibition. That wasn't my question.

A. No, I said there was no standard form such as form B 2, but as you do in drafting agreements you look at a precedent and I suppose some of the agreements over the years that followed might come to look like a form.

Q. Did you have any occasion in your dealings with RKO when you were with the Regan Goldfarb firm or now to review any of the agreements that RKO entered into with merchandisers for using elements of the King Kong movie?

A. Yes.

Q. Do you consider yourself familiar with the terms in those agreements?

A. I would have to look at each one, but broadly I might.

Q. Do you have a recollection that there are certain terms that appear in each of the agreements, certain representations by RKO, for example?

A. Generally it will provide that RKO has the right to issue the license that is granted in the agreement, it will provide that trademarks or copyrights will be either in the name of the merchandiser or RKO, but at the end of the license term transfers are assigned to RKO. There will be some provision on what to do with goods that are left

1 over after the license expires, where they have a period of
2 time to dispose of them. There will probably be a
3 provision not to make any more after a certain period of
4 time so that leftover won't be magnified. There will be
5 provisions for payment. Sometimes there may be a provision
6 for bankruptcy in case the licensee goes broke, so you can
7 terminate. And the normal contract provides provisions of
8 a license for anything.

9 Q. Have you had any occasion, Mr. Regan, while you
10 were with the Regan Goldfarb firm and up to the present
11 time, to make any investigations of King Kong uses that RKO
12 had not licensed?

13 A. From what date was that, please?

14 Q. From the time you were with the Regan Goldfarb
15 firm up until the present.

16 A. Yes.

17 Q. You have had that occasion?

18 A. Yes.

19 Q. Can you tell me what those investigations
20 consisted of?

21 A. If someone referred to us, we found ourselves
22 with the use of the character or name King Kong or some
23 element of the King Kong movie which we had not authorized,
24 we would then inquire of the user just to make sure someone
25 had not given them a sublicense from us, and then when we

found out it was not authorized we would tell them to stop.

Q. And were those inquiries and telling the person to stop done in writing or were they oral?

MR. GALLATIN: Your Honor, could we have a time frame to these questions, what period of time prior to 1975? I would like to know if we are going back to 1933 now or what.

MS. FAUCHER: I think we are going back to 1958 when Mr. Regan --

MR. GALLATIN: May we also know when it ends?

MS. FAUCHER: I said up to the present.

THE WITNESS: Is there an open question?

THE COURT: No, I don't think so.

Q. Mr. Regan, were those inquiries in writing --

THE COURT: Yes, there was. I take it back.

A. Yes, generally in writing. I couldn't say if there were some telephone calls. Probably all in writing.

Q. You said that RKO, I believe you said RKO exploited the 1933 movie, has exploited it by theatrical exhibition.

A. Yes.

Q. Has RKO ever licensed other people, given them the ability to also make a King Kong movie based on the 1933 movie?

A. Yes, licensed Dino De Laurentis Corporation to

1 just a guess.

2 Q. Can you give me examples of some of the items
3 that Paramount allowed other people to produce using King
4 Kong elements?

5 A. Yes. There was a Schrafft's candy bar, I think
6 there was a Good Humor. There was also Jim Beam bourbon
7 whiskey, commemorative bottle. Let me think. There were
8 so many of them too.

9 THE COURT: Who was on the bottle?

10 THE WITNESS: The bottle was King Kong. It was
11 a bust of King Kong. When you took his head off it poured.
12 I have an untouched one at home.

13 THE COURT: Pity.

14 THE WITNESS: It is a pity but I am going to be
15 rich some day with it.

16 THE COURT: Richer.

17 Q. Mr. Regan, who owns the copyright in the King
18 Kong Dino De Laurentis move?

19 MR. GALLATIN: Objection, your Honor. I think
20 we need a foundation as to the competence of this witness
21 to testify to such matters.

22 THE COURT: Sustained.

23 Q. Are you familiar with the agreement whereby RKO
24 licensed Dino De Laurentis to make another King Kong movie,
25 Mr. Regan?

13

1 A. That his father, general Cooper, owned the
2 property King Kong and had only licensed RKO in 1932 to
3 make one picture and all collateral benefits, including
4 merchandising rights, publishing rights, belonged to the
5 Coopers, the heir, Major Cooper, including the right to do
6 remakes or sequels of the pictures.

7 Q. What was RKO's position with respect to
8 Universal and Major Cooper's claims, just briefly?

9 A. With respect to the Universal claim, action of
10 declaratory judgment, it was our position that the picture
11 was properly copyrighted and the picture was not in the
12 public domain or property.

13 With respect to Major Cooper, there were two
14 contentions. The work that had been done by his father for
15 hire belonged to the employer RKO Pictures and then,
16 further, he had given RKO Pictures an all-rights agreement,
17 which is a printed form, quite comprehensive, and RKO
18 relied on that also to claim ownership to the picture, the
19 right to do remakes, sequels and all collateral rights
20 including merchandising rights, with the exception of
21 publishing rights which was explicitly reserved by General
22 Cooper in his all-rights agreement.

23 Q. Before there were any judgements entered in that
24 litigation, did RKO at any time attempt to settle with
25 Major Cooper?

1 A. Do I have the assignment that I may look at it?
2 I don't know if I made that analysis since the deposition.

3 Q. Okay.

4 To try to give you a little more focus, Mr.
5 Regan, let me just remind you that Mr. Gallatin at page 132
6 asked you to review the document and then he asked you "does
7 this memorandum currently reflect RKO's current
8 understanding and position with respect to its rights in
9 King Kong after the resolution of the Universal versus RKO
10 and Cooper litigation in California?" You responded "No,
11 not necessarily, I am trying to prepare a new one because I
12 never had the Cooper assignment until -- I only got the
13 Cooper assignment recently."

14 You were then asked "Are there any modifications
15 to this memorandum that you make?" You responded "I really
16 can't tell you. By the next time I will be able to tell
17 you because I would have gotten out the judgements."

18 I am asking you now do you have any modification
19 to make to Exhibit 97?

20 A. No, I don't. I don't think I have done any of
21 the things that I said I would, so I can't give any
22 modifications now and I wouldn't without talking to people
23 at RKO.

24 Q. Mr. Regan, during the period 1980 to 1982, do
25 you know if RKO has received requests from people to obtain

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1 licenses to use King Kong, the King Kong property, either
2 the name or the character?

3 A. I suppose the time period is difficult for me to
4 tell what time. They have received requests since
5 Universal acquired the merchandising rights, which would be
6 yes. The answer is yes.

7 Q. Do you have any specific requests that RKO has
8 received in mind, since 1980?

9 A. Yes. There was one to put a big balloon on the
10 Empire State Building from the Keith organization. I don't
11 know whether that request originated with us unless I see
12 my deposition with Universal. There was a proposed
13 advertising campaign I think it was by Continental Airlines
14 and also the printing of a couple of thousand posters by
15 Continental to be given to their employees or whomever.

16 And then there was a proposed Budweiser beer ad
17 I think to use a caricature, King Kong or the Empire State
18 scene. These are all from my recollection.

19 All the documents on these, of course, you both
20 have. So it would be more accurate than I am.

21 Q. With respect to those three circumstances you
22 have just mentioned, the Continental Airlines and Budweiser
23 and Keith, did RKO actually grant any licenses?

24 A. No.

25 Q. Do you know if Universal did with respect to any

1 of those entities?

2 A. I know the balloon appeared up there, King Kong
3 on the Empire State Building. I assume it was cleared with
4 Universal. But I don't know.

5 Q. Do you know if in any of those three
6 circumstances RKO referred the request to Universal?

7 A. I think we may have referred all three of them.
8 I don't really recall. I think we referred at least one.
9 I think we referred the balloons, the Empire State ape
10 balloon to them. I think the Continental. Yes, the
11 Continental, because it had the poster involved. That's
12 two of them. The Budweiser I don't recall. I think that
13 just went away.

14 Q. Mr. Regan, let me refer you back to Plaintiff's
15 Exhibit 97.

16 A. Yes.

17 Q. Have you ever had occasion to relate your views
18 as evidenced in that memorandum to anyone at Universal?

19 A. I've talked to Mr. Joseph DiMuro.

20 Q. Under what circumstances have you talked to Mr.
21 DiMuro about the views that you have set forth in that
22 memorandum, Exhibit 97?

23 A. They are all telephone conversations or perhaps
24 the letter following up. Is that what you mean by
25 circumstances?

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Q. What prompted the telephone conversation?

2

A. I am trying to recall whether he called me or I called him. The issue would have been what do we do with, for instance, the balloon thing, if I talked to him on that, or the posters, the Continental posters. I think there may have been postcards too that I may have called and talked to him. I don't know who may have initiated the calls. I have no diary entry to help me. I have looked for that.

9

Q. In these telephone conversations, what was your position with respect to to RKO's rights vis-a-vis Universal's rights?

12

A. In my opinion, -- I spoke for RKO at the time -- it was that although Universal had merchandising rights, roughly as defined earlier in this testimony, it could not make use of any graphics from the copyrighted original 1933 picture in the exercise of those merchandising rights without the permission of RKO.

18

Conversely, RKO couldn't put out a game or jigsaw puzzle using those things because that was the merchandising right that belonged to Universal. So as touched upon in this memo we were at loggerheads.

22

Q. What was Mr. DiMuro's position?

23

A. He disagreed with me at all times on this point.

24

Q. How did he disagree with you?

25

A. In a very gentle voice. He was very gentlemanly

1 about it. He just said I don't agree with you. One
2 argument that he gave, in addition to the fact he had the
3 assignment of Cooper, the explicit ownership of the
4 merchandising rights, that the position that we took
5 diluted if not frustrated certain exercise of merchandising
6 rights. It might be that Empire State scene that
7 Merchandising wanted and couldn't use it. I was
8 sympathetic to that from a commercial viewpoint. From a
9 legal viewpoint, I thought that Universal did not have the
10 rights.

11 Q. When you say Universal did not have the rights,
12 what rights do you mean?

13 A. The right to use anything from the 1933
14 copyrighted picture.

15 Q. Anything from the picture?

16 A. They had a right to use -- none of the graphic
17 elements. But under that ruling all elements in the
18 picture that were in the novel allegedly were in the public
19 domain. So they might have had a right to use part of the
20 plot. They had a right to use the plot anyway, the
21 assignment from Cooper and the court. I am talking about
22 graphic scenes from the picture.

23 Q. you are talking about --

24 A Graphics from the picture.

25 Q. Like stills?

A. No. In a game -- they couldn't use stills. I am talking about merchandising. The simple one is the jigsaw puzzle. Take the Empire State scene and make a jigsaw puzzle out the of.

Q. You are talking about literally the scene as it is on the celluloid of the film?

A. Right, actual graphics.

Q. You are not talking about taking the picture of Empire State Building with that inflatable gorilla balloon?

A. No, right out copyrighted picture, the famous scene that seems to draw most attention from merchandisers.

MS. FAUCHER: I don't have any further questions, your Honor.

MR. GALLATIN: I think we can be very brief, your Honor.

CROSS-EXAMINATION

BY MR. GALLATIN:

Q. Good afternoon, Mr. Regan.

A. How do you do, Mr. Gallatin.

Q. Mr. Regan, I wish you would indulge me and I know you started my education during the deposition about these Hollywood terms and I think you have helped us out today. I would like to ask you again about these so-called merchandising rights. It's my understanding from your testimony here today and from your testimony in your

1 position and now, if I may put it in the broadest possible
2 way, you worked with the law department, what your
3 relationship was?

4 A. The law department at MCA and at Universal isn't
5 very neatly structured as it might be at some other
6 companies.

7 For example, we list on our annual report that
8 our outside counsel, Rosenfeld, Meyer and Susman, which is
9 a law firm in Beverly Hills, is listed as the general
10 counsel of the company.

11 The house counsel is somebody else, a gentleman
12 named -- at the moment and who was then the house counsel --
13 Mr. Sheldon Mittleman and he sort of supervises a group of
14 12 to 15 lawyers who handle mostly the in-house matters
15 involving the pictures and the television series, such as
16 the drafting of the contracts and matters which come up in
17 relationship to those properties.

18 My own responsibility at the time, as I said,
19 was I originally came in as the person who handled
20 government affairs kind of matters and then was asked to,
21 in a sense, take on this additional responsibility of
22 supervising the company litigation, corporate litigation.

23 Q. Can you put a date on that, I don't mean an
24 exact date?

25 A. I believe it was the beginning of 1981.

1 Q. UP until that time, had you worked with outside
2 counsel for Universal on litigated matters?

3 A. Not specifically.

4 Q. Generally, in some way? What I am getting at,
5 when you say not specifically, you mean not on a
6 specifically lawsuit?

7 A. Not on all the company litigation. I believe at
8 that time we were involved -- the government had brought a
9 major antitrust action against the television networks and
10 we were involved in that and our outside counsel was
11 representing us and I was involved with our outside counsel
12 in that matter.

13 Q. When your duties changed in 1981 you became
14 responsible for the supervision of outside counsel in
15 outside litigation, did you then have occasion to start
16 dealing with your general counsel more frequently?

17 A. Yes, I did.

18 Q. Are there any particular lawyers with whom you
19 have dealt over the years since 1981 on matters at your
20 general counsel's firm?

21 A. Well, there were many lawyers over there that I
22 dealt with as well as lawyers in other firms all across the
23 country.

24 Q. Did you deal with Mr. Steve Kroft on occasion?

25 A. Yes, I did.

A0000155

1 Q. Would you identify him for us, please?

2 A. Mr. Kroft is a partner in the firm of Rosenfeld,
3 Meyer and Susman.

4 Q. All right. As of 1981 had you had dealings
5 prior to 1981 with Mr. Kroft?

6 A. Yes, I believe I had.

7 Q. What sort of dealings were they?

8 A. Mr. Kroft was at that time -- I can't tell you
9 the exact status of the case -- was handling the so-called
10 betamax case, which was a case of some notariety which has
11 seen gone to the Supreme Court and been adjudicated.

12 Q. Did you work with him on that case in some
13 capacity?

14 A. No, I didn't work with him directly. There were
15 aspects of that case which involved political
16 considerations, such as the congress and I got involved
17 from that point of view.

18 Q. That was the occasion for your working with him
19 on the case in the broader sense?

20 A. That's right.

21 Q. I take it from your answer to one of my previous
22 questions that you yourself did not become involved in the
23 outside litigation that Universal had pending, say for
24 example between 1978 and 1980, if there was pending
25 litigation?

1 A. That's right.

2 Q. Were you familiar or were you aware, in the
3 broadest sense of that term, Mr. Hadl, that Universal was
4 in litigation with RKO over its right to make a motion
5 picture, a King Kong motion picture, when that litigation
6 was ongoing?

7 A. In the broadest sense of the term.

8 Q. How would you use that term in the broadest
9 sense?

10 A. I was really not familiar with the specifics of
11 the case.

12 Q. You were not involved in the day to day
13 activities of the case?

14 A. Not at all.

15 Q. Did you have any responsibilities at that time
16 with respect to assisting Mr. Kroft? It's been on the
17 record here that Mr. Kroft was responsible for handling it
18 outside?

19 A. No, not at all.

20 Q. Did you work at all in conjunction on that case
21 with Mr. DiMuro?

22 A. Not at all.

23 Q. Now, at some point in time, Mr. Hadl, you
24 learned of the product on the market called Donkey Kong; is
25 that correct?

1 A. That's correct.

2 Q. Could you tell us, as best you recall, when that
3 was?

4 A. I believe it was in early April of 1982.

5 Q. And how did you come to learn of it?

6 A. Mr. Sheinberg sent me -- I can't exactly recall
7 what it was but I believe it was rather short, which was
8 either a picture or something -- a representation of Donkey
9 Kong from a trade publication and said would you please
10 look into this.

11 Q. Do you recall what it is you did?

12 A. Yes, I do.

13 Q. Would you tell us?

14 A. I went home and asked my three children whether
15 they had ever played this game and they indicated to me
16 that, yes, they had. I said I wanted to go and take a look
17 at it and could they direct me to where that would be and
18 the next day we went over to one of the arcade places in
19 Los Angeles and played the game.

20 Q. You played it. Did you do anything else after
21 playing the game?

22 A. No. I played it. I must confess I was not very
23 good at it. They were a little better. And I was able to
24 get a little better feel watching them play. I believe I
25 asked them at the time -- I said what they thought, did

1 they think about King Kong when they were playing it and
2 they said to me, yes.

3 MR. KIRBY: Objection, your Honor.

4 THE COURT: Maybe it's expert testimony.

5 A. I thought it was.

6 Q. Going back to the instruction -- I'll use the
7 word instruction -- from Mr. Sheinberg to look into it, do
8 you recall whether you were given anything more than just
9 look into this? Was there a request that you report back?

10 A. I don't remember whether he specifically asked
11 that I report back. I certainly did.

12 Q. Do you recall what you reported back in
13 substance?

14 A. Yes, I reported back, I said that I had played
15 the game, that my children had played the game and that I
16 thought we had a claim.

17 Q. Did you consult with any attorneys at that point
18 as to whether you would have a claim?

19 A. Yes. At that point I called Mr. Kroft.

20 Q. What did you tell Mr. Kroft?

21 A. I told Mr. Kroft that I was -- he was going to
22 have to get a couple of quarters and go play a game.

23 Q. Did Mr. Kroft subsequently report back to you?

24 A. Yes, he did.

25 Q. Do you recall when that was?

1 A. That would have been within a pretty close time
2 frame, again, within the same period early April of 1982.

3 Q. When this foray of yours into some arcade to
4 play the game took place -- incidentally, do you recall
5 where that was?

6 A. Where the arcade was?

7 Q. Yes.

8 A. Yes, I do.

9 Q. Where was it?

10 A. It was on Pico Boulevard in Los Angeles.

11 Q. When that occurred, when you were playing the
12 game and you reported back to Mr. Sheinberg and you asked
13 Mr. Kroft to go play the game, were aware at that point
14 whether or not Universal had met with any representatives
15 of Coleco on any matters?

16 A. No.

17 Q. Now, when you reported to Mr. Kroft -- excuse me --
18 when you asked Mr. Kroft to play the game, he subsequently
19 got back to you?

20 A. Yes, he did.

21 Q. Did he ever get back to you in writing?

22 A. No, not that I recall.

23 Q. Did he get back to you orally?

24 A. Yes.

25 Q. What did he tell you?

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1 when there are outstanding King Kong licensing agreements
2 and there are King Kong activities going on to generate
3 goodwill. Mr. Kroft advised Universal, and they are in
4 evidence now as 92 and 93, in 1980 of Universal's rights to
5 pursue its merchandising rights.

6 Mr. Kroft was familiar with the RKO litigation
7 and this is not a breach of contract suit, your Honor. It
8 is a trademark infringement suit based on 43 A of the
9 Lanham Act and that's what it started out as. If your
10 Honor wants to take the position that trademark rights are
11 frozen. They are not. They change and they depend on
12 goodwill and all Mr. Kroft would have to know in order to
13 render advice -- he may be wrong with the advice -- all he
14 would have to know is whether there is goodwill to King
15 Kong existing at the time rendering the advice. For a
16 trademark case that will do it, bar nothing else.

17 MR. KIRBY: Your Honor, indeed Mr. Fairhurst has
18 made my point. Mr. Kroft in these letters in evidence
19 written June 11, 1980, even prior to Mr. DiMuro's
20 memorandum, which Mr. DiMuro testified he discussed with
21 Mr. Kroft and Mr. DiMuro said didn't have anything to do
22 with trademark rights. That was not what Universal's
23 president was seeking from him. He was seeking other type
24 of advice about merchandising.

25 Universal in this litigation did not file a

Hadl - direct

604

merchandising violation claim against Nintendo. It filed an action under 43 A. I agree have few things are actually frozen in time and I guess trademarks conceivably once abandoned, once not transferred, can under very difficult circumstances be reestablished. But there's been no foundation, your Honor, to show that Mr. Kroft at this point in rendering the advice that is now being sought to be elicited in testimony from this witness knew anything whatsoever about the status of Universal's rights with respect to a trademark in King Kong or any of the activities of Universal during the period June 11, 1980 up until the time he was sent out to play Donkey Kong.

MR. FAIRHURST: All he had to know was that there was a Cooper judgment.

THE COURT: All right. I obviously have not had an opportunity to read the authorities which you have cited to me and I have a lot of respect for your citations, particularly, given your success in the past. But I think, Mr. Kirby, what I am going to do is the following: My suspicion is, without having read those cases, that they deal primarily with the question of admissibility and perhaps indeed even with a jury case, though I don't know that to be the case. This is nonjury. I fully recognize that the issue of good faith is a key issue, may be a key issue in this. I also recognize everything that you have

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told me about the inadequacies that you believe have been established with respect to any opinion Kroft would render at that time and so, in the classic words that the chancellor uttered probably a million years ago, I will take it for what it is worth.

I am going to overrule the objection.

What did he say?

BY MR. FAIRHURST:

Q. What did Mr. Kroft tell you?

A. Mr. Kroft told me that he also thought we had a claim.

THE COURT: Anything else?

THE WITNESS: I told him to prepare a complaint and to get a telex prepared to send to Nintendo.

Q. Did Mr. Kroft prepare a complaint?

A. Yes, he did.

Q. Did Mr. Kroft prepare the telex that was subsequently sent to Nintendo?

A. Yes, he did.

Q. Do you recall, Mr. Hadl, whether you reported back to Mr. Sheinberg on Mr. Kroft's reports?

A. I believe I did.

THE COURT: Excuse me. Do you know of any other communication that was had with Mr. Kroft on this subject prior to your telephone call?

1 THE WITNESS: From me or from anybody else?

2 THE COURT: Anyone. Do you know if he talked to
3 anyone other than you on the subject?

4 THE WITNESS: I don't know that.

5 THE COURT: Okay. We'll stand in recess until
6 tomorrow morning at 9:30. I would like to see counsel
7 briefly at the side bar.

8 (Adjourned to 9:30 a.m., May 23, 1985)